Supreme Court, U. S.
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No. 80-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTINENTAL TRAINING SERVICES, INC. AND GARY EYLER,

Petitioners,

vs.

ANTHONY J. VENZARA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED.

1. Whether the Court of Appeals properly affirmed the trial court's exercise of discretion in basing an assessment of damages upon affidavits submitted by the plaintiff when petitioners were defaulted for failing to provide discovery related to damages and had neither submitted opposing evidence nor requested a hearing on the issue of damages.

2. Whether the Court of Appeals properly affirmed the trial court's exercise of discretion in holding the guarantor of a promissory note bound by a default judgment against the principal where the guarantor controlled the litigation on behalf of the principal, admitted he was guarantor, and admitted that no payments had been made upon the note.

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BRIEF IN OPPOSITION.

STATEMENT OF THE CASE.

Anthony J. Venzara ("Venzara") filed suit against Continental Training Services, Inc. ("Continental") and its president, Gary Eyler ("Eyler"), alleging that Continental had breached an agency contract with Venzara and that neither Continental nor Eyler had paid upon a promissory note for which Continental was the principal debtor and Eyler was the guarantor. (Tr. 1-3). Continental admitted that it had entered into an agency contract with Venzara and that it had executed a promissory note in favor of Venzara. (Tr. 19). Continental also claimed, as an affirmative defense, that it was entitled to a setoff of $17,908.80 against Venzara, for contractual payments which Venzara allegedly had retained improperly. (Tr. 20). Eyler ad-

mitted that he was guarantor of the note and that neither he nor Continental had paid upon the Note. (Tr. 34).

Venzara served two sets of interrogatories upon Continental. (Tr. 41, 64). Continental's responses to these interrogatories were signed by Eyler, who stated explicitly that he was answering both in his individual capacity and on behalf of Continental. (Tr. 85, 121-128). Venzara found that the answers to some of the interrogatories dealing with his damages and Continental's alleged setoff were unresponsive and moved for an order compelling supplementary answers. (Tr. 62). The court granted Venzara's motion, stating, "[D]efendant's answers are unclear and unresponsive to the questions posed." (Tr. 69).

After the court granted Venzara's motion to compel, both petitioners moved for additional time to comply with the order, asserting that "subsequent to the filing original answers to interrogatories, all records pertaining to the above-captioned cause that were in the custody of the defendants were inadvertently destroyed by cleaning personnel in defendant's offices." (Tr. 73). In response to this motion, the court stated:

> A review of the Motion and the interrogatories to which it was directed disclosed that the defendants had either misread the original interrogatories, or deliberately responded with incomplete and/or evasive answers. Today, January 30, 1978, the defendants have filed a motion seeking delay in the trial on the ground that certain material in defendants' office was inadvertently destroyed by the janitorial service. Without particularizing the specific papers that were destroyed, the defendants simply categorize the papers as "all records pertaining to the above cause of action." Without specifying when or how the lost papers will be re-established, the defendants simply advise that an effort is being made to reconstruct them.

(Tr. 75). The court ordered the parties to confer and then to confer jointly with the court, emphasizing, "This cause is set for, and will be tried on, March 14, 1978 with a pre-trial conference on February 6, 1978." (Tr. 75).

On February 2, 1978, the parties submitted their Joint Pre-Trial Stipulation. (Tr. 80). The parties stipulated to the authenticity of the contract and the promissory note (Tr. 81). The parties also entered into the following stipulation:

> VII. *Issues of Fact To Be Litigated*
>
> A. The amount due the Plaintiff pursuant to the contract between the parties
>
> B. The amount due the Plaintiff on the promissory note
>
> C. The amount Defendant is entitled to as a setoff against the amount found to be due Plaintiff.

(Tr. 81).

On the day before the trial was to begin, Continental had neither complied with the court's order to supplement its answers to interrogatories, nor substantiated its claim that necessary documents had been destroyed. The court entered an unpublished order defaulting the petitioners and striking their answers and affirmative defenses. (Tr. 90-92). The court found:

> [T]he defendants have deliberately disregarded the Court's instructions by failing to either supply the documents in question or sworn affidavits explaining and verifying their destruction or any valid effort towards their reconstruction. This deliberate inaction on the part of the defendants has totally frustrated plaintiff's efforts toward discovery.

(Tr. 91).

The order specified the following procedure for assessing damages:

> Plaintiff shall file the sworn proof of his claim with the Court, together with a proposed final judgment form, within twenty days hereafter. The defendants shall have ten days from the filing of plaintiff's sworn proof within which to fully and properly file a response thereto.

(Tr. 92).

Pursuant to the court's order, Venzara filed affidavits to support his claim for damages. (Tr. 103-114). In response, Continental filed no opposing evidence and requested a hearing only on the issue of attorney's fees. (Tr. 101-102). The court entered an unpublished final judgment in favor of Venzara, basing its assessment of damages upon Venzara's affidavits. (Tr. 115-116). Judgment was entered against Continental for $48,701.00 on the agency contract and against both Continental and Eyler for $17,095.27 on the promissory note. (Tr. 115-116).

Petitioners appealed from the judgment. After hearing oral argument, the Fifth Circuit affirmed the judgment without opinion pursuant to Local Rule 21.[1]

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1. Rule 21 of the Local Rules for the United States Court of Appeals for the Fifth Circuit provides:

> When the Court determines that any one or more of the [specified] circumstances exist and is dispositive of the matter submitted to the court for decision . . . and the Court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

SUMMARY OF ARGUMENT.

Neither the Federal Rules of Civil Procedure nor the authorities cited by petitioners preclude assessment of damages against a defaulted defendant based upon affidavits. By failing to submit opposing affidavits and failing to request a hearing on the amount of damages due on the contract, Continental waived the right to claim that the procedure used was erroneous. Because the only factual issue to be litigated was the amount of damages, the procedure used to assess damages after petitioners were defaulted for failing to provide discovery on damages was proper. Therefore, this is an inappropriate case for establishing general procedural requirements for assessing damages in default cases.

The general rule that an individual defendant is entitled to a trial despite the default of a corporate defendant is inapplicable when the individual defendant controls the litigation on behalf of the corporate defendant and is liable only as guarantor of a corporate obligation. This exception to the general rule is consistent with existing authority. The question raised by this situation is not sufficiently important to justify review by this Court.

The Fifth Circuit's affirmance of the district court's unpublished order without opinion creates no precedent and would produce no conflict of authority even if it were contrary to the rulings of other courts.

ARGUMENT.

1. The Trial Court Properly Based Its Assessment of Damages Upon Affidavits Submitted by Venzara.

Petitioners were defaulted and Continental's affirmative defense of setoff was stricken because of Continental's failure to provide discovery on the issues of damages and setoff. The court

ordered Venzara to file a sworn proof of his claims and provided petitioners with an opportunity to file a full response. (Tr. 92). Despite this opportunity, petitioners submitted no opposing evidence and requested a hearing only on the issue of attorney's fees. (Tr. 101-102). To preserve alleged error a party must "make known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." Rule 46, Fed. R. Civ. P. By failing to do this petitioners waived any purported impropriety in the court's action. *Cundiff* v. *Washburn,* 393 F. 2d 505 (7th Cir. 1968); *Safeway Stores Inc.* v. *Dial,* 311 F. 2d 595 (5th Cir. 1963); *Hartford Accident & Indemnity Co.* v. *Bank of Commerce,* 170 F. 2d 94 (5th Cir. 1948). Despite this waiver, Petitioners now assert that the procedure used by the court contravened existing authority and that they were entitled to a hearing on the issue of damages.

Monogram Models, Inc. v. *Industro Motive Corp.,* 492 F. 2d 1281 (6th Cir.), *cert. denied,* 419 U. S. 843 (1974) supports the procedure used by the trial court in this case. In *Monogram Models* the defendant failed to answer interrogatories pertaining to damages and was defaulted on the issue of damages. The trial court awarded the plaintiff $25,000.00 in lieu of actual damages. The Sixth Circuit affirmed, stating:

> Industro cannot prevent Monogram from ascertaining the facts with regard to damages by remaining silent and failing to answer interrogatories duly submitted to it, and then assert that it has been denied due process when sanctions for such refusal to answer are imposed as outlined in the Federal Rules of Civil Procedure. The District Court did not err in defaulting Industro on the issue of damages.

492 F. 2d at 1287-1288.

The trial court in the present case was more lenient than was the trial court in *Monogram Models.* The parties stipulated that the only issues of fact to be litigated were the amount of dam-

ages to which Venzara was entitled and the amount of setoff to which Continental was entitled. (Tr. 81). Even after striking the affirmative defense of setoff and defaulting petitioners for failure to provide discovery on damages and setoff, the court provided the petitioners with an opportunity to submit evidence in opposition to Venzara's affidavits. Although they failed to do this, and they requested a hearing only on the issue of attorney's fees, petitioners contend that the court erred by failing to conduct a hearing on all damages. Neither sound reasoning, nor the authority cited by the petitioners, supports this contention.

Even if the cases cited by petitioners supported the general proposition that a hearing on damages is required after default, they would be inapplicable to this case because they did not involve defaults for failure to provide discovery related to damages. *See Klapprott* v. *United States,* 335 U. S. 601 (1949) (defendant defaulted for failure to answer charges in proceeding to revoke citizenship); *Thomson* v. *Wooster,* 114 U. S. 104 (1885) (*pro confesso* decree entered after defendant failed to answer complaint); *Peitzman* v. *City of Illmo,* 141 F. 2d 956 (8th Cir.), *cert. denied* 323 U. S. 718 (1944) (defendants defaulted for failing to submit to depositions); *Geddes* v. *United Financial Group,* 559 F. 2d 557 (9th Cir. 1977) (defendants defaulted for failing to plead or otherwise defend); *Barber* v. *Turberville,* 218 F. 2d 34 (D. C. Cir. 1954) (default judgment set aside for excusable neglect in answering complaint; jury trial required on remand); *Thorpe* v. *City National Bank,* 274 F. 200 (5th Cir. 1921) (defendant defaulted for failing to plead or otherwise defend). One case cited by petitioners in alleged support of their contention did not involve a default judgment at all. *E. C. Gerhard Bldg. Co.* v. *City of Dallas,* 298 F. 264 (5th Cir. 1924).

Furthermore, the cases cited by the petitioners do not establish the proposition for which they are cited. None of these

cases held that it is improper to base an assessment of compensatory damages upon affidavits in a default case.

In only two cases cited by petitioners were judgments reversed because hearings were not conducted on the issue of damages. Neither of these cases presents a conflict with action taken by the Fifth Circuit in the instant case.

In *Eisler* v. *Stritzler*, 535 F. 2d 148 (1st Cir. 1976), the trial court defaulted the defendant and entered judgment for the full amount requested in the plaintiff's complaint. Because the record did not show that the trial court considered any evidence on the amount of damages, the First Circuit reversed, stating,

> Although the default judgment was proper, it would not have been correct to assess damages without a hearing. . . . The default judgment on the well-pleaded allegations in plaintiffs' complaint established only defendants' liability. It was incumbent upon plaintiffs to establish the extent of the damages resulting from defendant's violations. *See TWA* v. *Hughes, supra*, 449 F. 2d at 69-70; *Caribbean Produce Exchange* v. *Caribe Hudson Trailer, Inc.*, 65 F. R. D. 46 (D. P. R. 1974).

535 F. 2d at 153-154.

In *Eisler*, the defendant was defaulted for refusing to submit to a deposition. There is no indication that the discovery which was withheld was necessary to ascertain damages. Therefore, any requirement for a hearing in a case such as *Eisler* would be inapplicable to the present case, in which liability was not at issue, and the parties stipulated that the only fact issues to be litigated related to the amount of damages. Moreover, the propriety of alternative procedures, such as use of affidavits, to assess damages was not before the *Eisler* court. Therefore, *Eisler* does not support the proposition that a hearing is required in every case in which damages are awarded after a default judgment. This is demonstrated by the cases relied upon by the court in the quotation above. Although a hearing was

conducted in each of these cases, neither case dealt with the propriety of alternative procedures, and, therefore, neither held that a hearing was required.

In *Flaks* v. *Koegel,* 504 F. 2d 702 (2d Cir. 1974), the plaintiffs sought both compensatory and punitive damages, based on alleged securities fraud. After defaulting the defendant for failing to anwser interrogatories and failing to attend a deposition, the trial court entered judgment for the full amount sought in the complaint, including $400,000.00 in punitive damages. Holding that punitive damages should not have been assessed without an evidentiary hearing, the Second Circuit reversed, stating:

> While punitive damages are recoverable, it is evident that their amount cannot be fixed without an evidentiary hearing. An award of punitive damages is not a matter of right but is within the discretion of the trier of the facts and will depend upon the degree of wanton and willful conduct of the defendant. . . . But here there has been no trial of the facts and therefore no basis for determining how egregious or opprobrious that conduct has been. . . . Punitive damages are clearly not liquidated *or computable* and there is no basis at all here to award the amount set forth in the complaint.

504 F. 2d at 707 (emphasis added).

The court distinguished between punitive damages and damages which are susceptible of calculation. With respect to the plaintiffs' claims for rescission of certain securties transactions, the court observed, "The determination of the amount paid by the plaintiffs for the securities is easily made and presents none of the difficulties provoked by the punitive damage claim herein discussed." 504 F. 2d at 707.

Clearly, *Flaks* does not support the contention that assessment of compensatory damages without a hearing was improper in the present case. Damages on the promissory note obviously were liquidated. Furthermore, the contract in dispute in this

case provides formulae for determining the amounts payable to Venzara. (Tr. 7-8). Thus, as in *Flaks*, calculation of damages on this contract "is easily made and presents none of the difficulties provoked by the punitive damages question. . . ." 504 F. 2d at 707.

In *Trans World Airlines, Inc.* v. *Hughes*, 449 F. 2d 51 (2d Cir. 1971), *rev'd*, 409 U. S. 363 (1973), the trial court defaulted the defendants for failing to provide discovery and then referred the case to a special master for hearings on damages. The Second Circuit affirmed a judgment based on the master's findings, but did not address the question whether alternative procedures for determining damages would have been appropriate. Therefore, Hughes does not support the general proposition that a hearing on damages is required after default.

Even if *Hughes* had held that a hearing was required under the circumstances of that case, that holding would not control the instant case. Assessment of damages in *Hughes* involved complex isses of causation which are not present in the instant case. Moreover, the amount of damages was not computable from contractual formulae, as were the damages in the case at bar.

The hearings conducted in *Hughes* "extended over a period of two years, consisting of hundreds of hours of testimony and producing a transcript of 11,000 pages." 449 F. 2d at 72. *Hughes* was a complex antitrust case, in which the hearings addressed the question of proof of causation extensively because, "The default judgment did not give TWA a blank check to recover from Toolco any losses it had ever suffered from whatever source. " 449 F. 2d at 70. The issue of the amount of damages was vastly complex, involving expert calculations on the projected market for a fleet of aircraft which Trans World Airlines did not obtain and the losses suffered due to decreased fleet size. The final judgment was for $145,448,171.07. Obviously, any requirement for a hearing in a case such as *Hughes*

would be inapplicable to the present case, in which causation is not at issue and in which damages are based upon a contract and a promissory note, each of which provides the method for calculating the amount due.

The scarcity of reported decisions addressing the question whether a court may assess compensatory damages against a defaulted defendant by considering unchallenged sworn evidence without conducting a formal hearing indicates that the question does not arise often and is not sufficiently important to justify review by this Court. The peculiar facts involved make this an inappropriate case for establishing general procedural standards for assessing damages in a default case. Petitioners did not submit, nor did they even offer to submit, any evidence in opposition to the affidavits submitted by Venzara. The judgment in this case was the practical equivalent of summary judgment on the issue of damages, which is appropriate when conflicting evidence is not presented. *Interlake, Inc.* v. *Erie Industrial Trucks, Inc.*, 427 F. Supp. 1012 (W. D. Pa. 1977); *Alleghany Corp.* v. *Romco, Inc.*, 392 F. Supp. 38 (W. D. Pa. 1975). If a hearing had taken place, the only evidence presented would have been that submitted by Venzara. Therefore, the petitioners could not have been prejudiced by the trial court's failure to conduct a formal hearing, and this is not an appropriate case to raise the question whether a hearing may be required in a case in which conflicting evidence is presented.

2. The Guarantor of a Promissory Note Is Bound by a Default Judgment Against the Principal Debtor if the Guarantor Controls the Litigation on Behalf of the Principal.

Petitioners correctly assert that, as a general rule, an individual defendant is entitled to a trial despite the default of a corporate defendant. From that general proposition, they leap to the conclusion that, under the circumstances of the case at bar, a default against Eyler was inappropriate. The general rule

is simply inapplicable to the facts of this case. Eyler was a defendant in his individual capacity only as guarantor of a promissory note from Continental to Venzara. Eyler admitted that he was guarantor of the note and that neither he nor Continental had paid upon the note. (Tr. 34). Eyler was held liable only on the note. Petitioners have raised no question as to the propriety of the default judgment against Continental on the note.

Eyler controlled the litigation on behalf of Continental and signed the interrogatory answers which the court found to be unresponsive. (Tr. 123). Therefore, Eyler cannot claim that he was prejudiced by the misbehavior of another party over whom he had no control. Once the liability of Continental was established, no issues remained for Eyler to contest, and, entry of a default judgment against Eyler was proper. *Cf., Walter Heller & Co.* v. *Cox,* 343 F. Supp. 519 (S. D. N. Y. 1972), *aff'd mem.,* 486 F. 2d 1398 (2nd Cir.), *cert. denied,* 414 U. S. 827 (1973) (under principles of res judicata, individual guarantor who was president of corporate debtor and controlled litigation on its behalf bound by judgment against corporate debtor).

The appropriateness of a default judgment against an individual defendant under the peculiar circumstances of this case is an issue which apparently does not arise often. The need for guidance from the Supreme Court on this issue is not great, and, therefore, the question is not sufficiently important to merit review by this Court.

3. The Unpublished Decision of the Fifth Circuit Would Create No Conflict of Authority Even if It Were Contrary to Rulings of Other Courts.

Neither the order of the trial court nor the final judgment based on that order was published. The Fifth Circuit affirmed the trial court's judgment without opinion pursuant to a local rule which applies when the court determines that an opinion

would have no precedential value. Obviously, the affirmance of an unpublished order without opinion creates no precedent on any issue. The Fifth Circuit's decision would create no conflict of authority even if it were contrary to the rulings of other courts. The considerations established by Rule 17 of this court demonstrate that this is not an appropriate case for review on certiorari.

CONCLUSION.

The decision of the Fifth Circuit in this case is consistent with existing authority. Petitioners have waived any improprety in the trial court's action. The decision in this case created no precedent, and therefore would create no conflict of authorities even if it were contrary to the rulings of other courts. The questions presented are not sufficiently important to merit review by this Court. This Court should not issue a writ of certiorari to the Fifth Circuit to review this case.

Respectfully submitted,

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